Supreme Court of the United States.

No. 203—October Term, 1952.

In the Matter
of
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Debtor.

THE CITY OF NEW YORK,
Petitioner,
—against—
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION TO MODIFY JUDGMENT AND TO STAY MANDATE.

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JAMES D. O'NEILL,
Of Counsel.

THE COURT PRESS, N. Y. C.

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Motion to Modify Judgment and to Stay Mandate.

Respondent respectfully moves this Court to modify its judgment in this cause, dated January 12, 1953, so as to direct the District Court to take evidence on the question whether or not the City of New York had actual knowledge of Order No. 32, the bar order directing creditors to file claims in the reorganization proceedings, and respectfully requests that the mandate of this Court be stayed pending its decision of this motion.

The opinion of this Court holds that the City of New York was a "creditor" within the meaning of Section 77 of the Bankruptcy Act but that it was freed from the duty laid upon creditors of filing a claim in the reorganization proceedings, pursuant to Order No. 32 entered therein, owing to lack of adequate notice of this order. Since the City was a creditor, its failure to file any claim would

have barred its claim had it received actual notice, by mail or otherwise, of the bar order.

Admittedly respondent did not mail a copy of the bar order to the City, but relied instead on notice by publication and the duty of the City to file its claim because it knew of the reorganization proceedings. Respondent has reason to believe that the City had actual notice of the bar order other than by receiving from respondent a mailed copy. Respondent further believes that if proof of actual knowledge of the bar order by the City had existed in the record reviewed, this Court would have affirmed rather than reversed the judgment of the court below. Respondent therefore desires to have evidence taken in the District Court on this issue.

This precise issue was not mentioned in the original pleadings, their supporting affidavits or the decision of the District Court, and no testimony or evidence was received on the point. Respondent's theory, supported by the cases cited in its brief to this Court and later by the decisions of the District Court and Court of Appeals, was that notice to the City by publication, together with its knowledge of the reorganization proceedings, was sufficient. This was the theory of its petition and supporting affidavit in the District Court (R. 3, 20). The opposing affidavit of the City denied personal service of the bar order but did not deny actual knowledge of it (R. 37). The theory of the City was that its rights could not be affected without personal service of a notice specifically directed to it ordering its claims to be filed or by its voluntary submission of its claims to the District Court (R. 37). The District Court accepted the theory of the petition and took no evidence and made no finding on the question whether or not the City had actual notice of the bar order (R. 81, 86, 91-92). The dissenting opinion of Judge Frank in the Court of Appeals erroneously and without foundation in the record stated that the City had

no actual knowledge of the bar order (R. 95, 97, 99), although it agreed that actual knowledge would have been sufficient to bar the City (R. 100). The City has never denied actual knowledge of the bar order in any writing in the District Court, the Court of Appeals or this Court.

The respondent therefore believes itself entitled to a hearing in the District Court on a matter not decided below and never before deemed important until the opinion of this Court made it critical.

Willing v. *Binenstock*, 302 U. S. 272 (1937).

Accordingly, respondent respectfully prays that the judgment of this Court be modified so as to remand the case to the District Court for further proceedings consistent with the view that the District Court hold a hearing on the question whether or not the City of New York had actual knowledge of Order No. 32 of the reorganization proceedings of respondent and thereafter enter appropriate judgment between the parties, and respondent further prays respectfully that the mandate of this Court be stayed pending its decision of this motion.

Respectfully submitted,

EDWARD R. BRUMLEY,
Counsel for Respondent.

ROBERT M. PEET,
JAMES D. O'NEILL,
Of Counsel.